No. 80-1609.

JUN 5 1981

In the

Supreme Court of the United States.

OCTOBER TERM, 1980.

PROLERIZED NEW ENGLAND COMPANY
AND
HARTFORD ACCIDENT & INDEMNITY COMPANY,
PETITIONERS,
v.
BENEFITS REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR,
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
AND
RICHARD F. McNEIL,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Reply Brief in Support of Petition for Certiorari.

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Argument.

1. On the issue of whether the First Circuit's decision was consistent with this Court's decision in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 (1943),

332 U.S. 194 (1947), and progeny, respondents state, without any citation of authority, that

> The fact that the Board's opinion did not use the word "substantial" in describing the extent of McNeil's involvement in the loading process does not preclude the court of appeals from applying that quantitative term. . . .

Brief for the Federal Respondent in Opposition (hereinafter "Dir. Br."), p. 10. However, the problem in this case is not one of semantics, but of substance. Certainly the fact that the Board did not use the word "substantial" to describe McNeil's longshoring duties would be unimportant if it were clear that the Board in fact applied a substantiality-of-duties test. However, as the respondents themselves recognize, Dir. Br., p. 5, the Board in this case did *not* apply such a test, but rather reasoned that under this Court's decision in *Northeast Marine Terminal Co., Inc.* v. *Caputo*, 432 U.S. 249 (1977), it is sufficient for coverage under the Longshoremen's and Harbor Workers' Compensation Act that an employee is covered for "part" of his employment.[1] Since the Board based its decision on this broad interpretation of *Caputo*, the First Circuit was required under *Chenery* to "judge the propriety" of the Board's decision "solely by the grounds invoked" by the Board. 332 U.S. at 196. Contrary to respondents' contention, the essence of *Chenery* (and allocation of decision-making functions between the courts and the Board) is that the court of appeals may not *sua sponte* apply a substantiality-of-duties test

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[1] Indeed, it is precisely this interpretation of *Caputo* which the respondents urge in this case, Dir. Br., pp. 7-9, and in *Howard Trucking Co., Inc.* v. *Boudloche*, Dir. Br., pp. 6-10, and it is precisely this expansive assertion of jurisdiction by the Board which makes this case worthy of this Court's review.

to "the very activity on which the Board relied in reaching its coverage decision," Dir. Br., p. 10, because it is the function of the administrative law judge and the Board to determine whether McNeil's longshoring duties were "substantial," and the Board simply has not made such a determination in this case.[2]

In an effort to avoid this conclusion, respondents argue that McNeil's duties in connection with the Shear "unquestionably constituted a significant portion of his job." Dir. Br., p. 10. Although it is not this Court's function to make such a "factual" inquiry (Dir. Br., p. 9), it should be noted that the administrative law judge found, and the Board did not question, that for several months prior to his injury, McNeil worked on the night maintenance shift and was regularly assigned to the Prolo Mill (A. 24a, 29a), and that during that period McNeil also was responsible for changing the filters on the Shear only on Saturday mornings (A. 11a, 29a-30a). Contrary to respondents' contention, Dir. Br., p. 3, there is no evidence that McNeil performed routine maintenance and repairs "on both the Prolo Mill and the Shear" while he was on the night shift, or that McNeil "regularly maintain[ed]" the Shear. Dir. Br., p. I.[3] Similarly, the record does *not* indicate that McNeil

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[2] Respondents urge that the Board "did not say anything to" contradict respondents' contention that McNeil's duties with respect to the Shear "constituted a significant portion of his job." However, in reviewing a decision of the Benefits Review Board, a court of appeals is not free to draw factual inferences simply because they are not inconsistent with the decisions below. *See, e.g., Walter Tantzen, Inc.* v. *Shaughnessy*, 601 F.2d 670, 672 n.3 (2d Cir. 1979).

[3] In support of this contention, respondents rely on the First Circuit's statement that "there was no evidence that McNeil's duties with respect to the Shear were reduced in the weeks and months before his accident." A. 11a. However, it is undisputed that for several months prior to his injury, McNeil was assigned to the night maintenance shift and McNeil's own testimony was that during this period, it was on Saturday mornings that he worked on the

"was required to assist the shiploaders whenever they were shorthanded." Dir. Br., p. 3. The record shows only that when the shiploader crew was shorthanded,[4] "extra men" were assigned to assist the shiploading crew, R. 68, and that "occasionally" McNeil was among the employees so assigned (A. 22a, 38a).

2. Respondents correctly observe, Dir. Br., p. 9, that the First Circuit did not hold that McNeil was covered by the Act because he "occasionally" engaged in longshoring duties. However, as discussed above, the decision of the Board was predicated on such a holding and, accordingly, under the rule of *Chenery*, the Board's decision may be affirmed (if at all) only on that ground. Accordingly, as respondents recognize, Dir. Br., pp. 7-9, the question of whether an employee who performs longshoring duties "occasionally" is covered by the Act is an important issue in this case.

Respondents oppose the granting of certiorari on this issue on the ground that it has been settled by this Court's decisions in *Caputo* and *P. C. Pfeiffer Co., Inc.* v. *Ford*, 444 U.S. 69 (1979). However, there is nothing in *Caputo*, which involved a longshoreman who engaged in longshoring operations on a daily basis, to support respondents' view. *See* Petition for

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Shear. R. 100. For the same reason, it is not true that "When McNeil arrived at work each day, he did not know to which part of his employer's operation he would be assigned." Dir. Br., p. 3. Although McNeil so testified at one point, apparently in reference to some period of time during the course of his 2½ years of employment at Prolerized prior to the time that he was assigned to the night maintenance shift, the administrative law judge's specific factual finding, that during the period that McNeil was assigned to the night maintenance shift he was regularly assigned to the Prolo Mill, was to the contrary.

[4] McNeil testified that the shiploader crew needed no assistance from other employees, and he therefore performed no duties, in connection with the loading of "prolo" steel, R. 43, which comprises 60% of Prolerized's business. R. 37.

Writ of Certiorari, pp. 7-8. If, as respondents contend, this Court had intended to suggest that employees are covered by the Act if they spend or ever spent *any* of their time in longshoring activities, the Court never would have cited with approval the Third Circuit's decision in *Maher Terminals, Inc.* v. *Farrell*, 548 F.2d 476 (3d Cir. 1977), and the Fourth Circuit's decision in *Stockman* v. *John T. Clark & Sons, Inc.*, 539 F.2d 264 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977), which had adopted "primary duties" and "overall duties" tests, respectively.

Similarly, there is nothing in this Court's decision in *Ford*, which involved the question of whether loading or unloading cargo being transferred between land and water-based shippers is a "longshoring operation" at all, to support the contention that an employee who performs longshoring operations only "occasionally" is covered by the Act during the entire course of his employment. Indeed, this Court's fundamental holding in *Ford* was that the Act establishes "an *occupational* test," 444 U.S. at 80 (emphasis added), and it would be irrational to rule that an employee who "occasionally" engages in longshoring duties but who spends no significant amount of time on such duties is employed in the occupation of "longshoreman."

Contrary to respondents' contention, Dir. Br., pp. 8-9, the Second, Third and Ninth Circuits have taken a position conflicting with that of respondents and the Fifth Circuit in *Boudloche* v. *Howard Trucking Co., Inc.*, 632 F.2d 1346 (5th Cir. 1980), *cert. filed*, Docket No. 80-1563, March 14, 1981. The Third Circuit in *Dravo Corp.* v. *OSHRC*, 613 F.2d 1227, 1233 n.9 (3d Cir. 1980), did *not* abandon its earlier decisions in *Maher Terminals, Inc.* v. *Farrell, supra, cited with approval in Caputo, supra*, 432 U.S. at 272-273 n.34, and *Dravo Corp.* v. *Banks*, 567 F.2d 593 (3d Cir. 1977). In *Dravo Corp.* v. *OSHRC*, the Third Circuit stated only that its earlier sug-

gestion in *Dravo Corp.* v. *Maxin*, 545 F.2d 374 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977) — that the "great majority" of an employee's work must be maritime in nature in order to bring an employee within the scope of the Act — "may have reflected too narrow an interpretation of the Act." 613 F.2d at 1233 n.9. The Third Circuit did not even suggest that it was abandoning the "primary duties" test of *Banks* or *Farrell*. Similarly, although the issue which this Court considered in *Cargill, Inc.* v. *Powell*, 573 F.2d 561 (9th Cir. 1977), *vacated and remanded*, 444 U.S. 987 (1979), did not involve the question presented by this case, the Ninth Circuit in *Cargill* squarely ruled that an employee who had not engaged in longshoring duties for several months at the time of his injury was not covered by the Act, and that the language in *Caputo* relied upon by respondents herein must be read in light of the fact that the employee in that case spent "a part of" each workday in longshoring activities. 573 F.2d at 563-564.[5] Finally, the Second Circuit in *Fusco* v. *Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), *vacated and remanded*, 444 U.S. 1028 (1980), clearly stated that coverage under the Act depends upon an employee's "major activities." 601 F.2d at 668.[6]

3. Respondents' assertion (Dir. Br., p.11 n.9) that the petition "does not present any question concerning the correctness

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[5] In view of this Court's disposition of *Cargill*, it had no occasion to consider the Ninth Circuit's holding on this issue.

[6] Respondents note, Dir. Br., p. 9 n.7, that Judge Wyzanski, who wrote the Second Circuit's decision in *Fusco*, joined in the First Circuit's decision in this case. However, the First Circuit, by applying *sua sponte* a substantiality-of-duties test which was not relied upon by the Board, found it "unnecessary" to consider the contention that "occasional" duties are sufficient for coverage under the Act. In short, by failing to adhere to the scope of review dictated by *Chenery*, the First Circuit eliminated the possibility that its decision could conflict with the Second Circuit's decision in *Fusco* on this point.

of the court of appeals' observation that the Shear is a physically distinct part of the employer's operation whose sole function is to prepare goods for shipment" is incorrect. The First Circuit's observation in this regard was predicated on the Board's "foray into the record" (A. 8a), to make a factual finding with respect to the purpose of the Shear, which petitioners contend was improper.

Respondents' principal defense of the Board's "foray into the record" is that McNeil's testimony "was not challenged or contradicted." However, it was undisputed that the Shear cut all "heavy" steel into strips of four feet or less and McNeil himself admitted that the sheared metal was not necessarily loaded onto ships (R. 38; A. 23a). On the basis of this evidence, it would be proper to infer that the cutting performed by the Shear serves a number of purposes, such as accommodating customers' furnaces, facilitating transportation, and the like. *Cf. Castro* v. *Hugo-Neu Proler Co.*, 10 BRBS 35 (1979).[7]

Respondents also seek to dismiss the problem of the Board's fact-finding by suggesting that the only problem was that "the administrative law judge did not specify the machine's purpose in his decision" (Dir. Br., p. 11). However, while the administrative law judge did not *in haec verba* discredit McNeil's testimony, it is clear that the administrative law judge did not accept this testimony. He found that metal is

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[7] Petitioners urged this point in the court of appeals, and respondents therefore are mistaken in asserting (Dir. Br., p. 11) that "[e]ven now, petitioners do not suggest that the Shear cut steel for some other purpose." Indeed, petitioners contended in the court of appeals, as they do before this Court, that if the record with respect to this jurisdictional issue — as to which the claimant has the burden of proof — appears inadequate to enable review of the administrative law judge's decision, the case should be remanded to the administrative law judge for additional factual findings or further proceedings.

"processed" through the Shear (A. 23a), and that all of McNeil's work for the months prior to his injury was related to "the manufacturing or reprocessing phase of Employer's operation which was wholly separate and distinct from the loading of vessels" (A. 30a). He distinguished a prior decision by the Board on the ground that that case "involved . . . a shearer machine cutting scrap metal destined for export," whereas McNeil "was injured while employed in the manufacturing, or reprocessing, phase of Employer's operation" (A. 30a-31a). On remand, he vigorously protested the Board's factual findings (A. 42a, 45a-49a, 75a n.3). In these circumstances, respondents' contention that "The Board's comments were fully consistent with the administrative law judge's findings" (Dir. Br., p. 11) is simply wrong.

Conclusion.

For the foregoing reasons and for the reasons stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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